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6 UNITED STATES BANKRUPTCY COURT  
7 EASTERN DISTRICT OF CALIFORNIA

8 In re Case No. 01-61060-A-11F  
9 CENTRAL VALLEY AG ENTERPRISES, DC No. MLF-1  
10 INC.

11 Debtor.  
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13 FINDINGS OF FACT AND CONCLUSIONS OF LAW  
14 REGARDING DEBTOR'S LIMITED OBJECTION TO  
15 PROOF OF CLAIM NO. 53 AND OBJECTION TO CLAIM NO. 54  
16 FILED BY THE INTERNAL REVENUE SERVICE

17 A hearing was held July 22, 2005, on an objection to two  
18 claims filed by Central Valley Ag Enterprises, Inc. (the  
19 "Debtor"). The Debtor objected on a limited basis to proof of  
20 claim number 53 ("Claim 53") filed by the Internal Revenue  
21 Service of the United States of America (the "IRS" or the "United  
22 States"). The Debtor also objected to proof of claim number 54  
23 ("Claim 54") filed by the IRS. The objection was on the ground  
24 that the IRS had filed each claim well after the claims bar date  
25 in the case. The United States filed counter motions to excuse  
26 late filing and to strike. Following the hearing, the court took  
27 under submission the Debtor's objection to claims and the  
28 counter motion to strike. The counter motion to excuse late filing  
was continued. This memorandum contains findings of fact and  
conclusions of law required by Federal Rule of Bankruptcy

1 Procedure 7052 and Federal Rule of Civil Procedure 52. This is a  
2 core proceeding as defined in 28 U.S.C. §157(b)(2)(B).

3 Background Facts and Procedural History

4 The Debtor filed its chapter 11 case on December 3, 2001.  
5 The deadline for a governmental unit to file a proof of claim was  
6 June 3, 2002. The Notice of Chapter 11 Bankruptcy Case, Meeting  
7 of Creditors, and Deadlines that contained this deadline was  
8 served on the creditors in the case, including the IRS.

9 The IRS has filed three proofs of claim in the case. Proof  
10 of claim number 31 in the amount of \$34,729.33 was filed timely  
11 on January 22, 2002. This claim is for year 2001 taxes. This  
12 proof of claim is not at issue here.

13 On October 9, 2002, the IRS filed a proof of claim in the  
14 amount of \$13,144,262.55 as Claim 53. This claim was late filed  
15 and covers tax years 1993, 1994, 1995, and 2001. At issue here  
16 is the Debtor's limited objection to Claim 53 on the grounds that  
17 it is late filed. The Debtor's previous substantive objection to  
18 this proof of claim will be discussed, as it is relevant here,  
19 below.

20 On October 8, 2003, almost one year later, the IRS filed  
21 Claim 54 in the amount of \$14,775,342.09. Claim 54 covers the  
22 same tax years as does Claim 53, but it includes a penalty of  
23 \$1,080,838.78. The objection to Claim 54 at issue here is the  
24 Debtor's first objection to Claim 54. Both Claims 53 and 54  
25 result from disallowance by the IRS of certain losses claimed by  
26 the Debtor's wholly owned subsidiary, Orange Coast Enterprises,  
27 Inc. as part of a "lease stripping tax shelter" arrangement.  
28

1 On June 24, 2003, the Debtor filed a Notice of Preliminary  
2 Hearing and Objection to Claim of Internal Revenue Service. The  
3 court treated the objection to claim as an adversary proceeding,  
4 docketed as adversary proceeding 04-1078, Central Valley Ag  
5 Enterprises, Inc. v. Internal Revenue Service. This objection  
6 was on substantive grounds and did not raise the issue of late  
7 filing. In September 2003, the United States moved to withdraw  
8 the reference and, following some procedural hiccups, the  
9 District Court withdrew the reference "for the limited purpose of  
10 making a determination of the legality of the lease-stripping tax  
11 shelter."<sup>1</sup> In January 2005, the United States moved for summary  
12 judgment in the District Court action. The District Court  
13 granted that motion, and determined that:

14 "The issue of plaintiff's [the debtor's] tax obligation as  
15 reflected by the disallowance of the losses from the lease-  
16 stripping tax shelter became final by operation of the  
17 statutory terms of TEFRA [the Tax Equity and Fiscal  
18 Responsibility Act of 1982]. As the court interprets the  
19 terms of TEFRA, this means the matter was 'contested before  
20 and adjudicated by a judicial or administrative tribunal of  
21 competent jurisdiction before the commencement of the case  
22 under this title.' As a consequence, the tax issue falls  
23 within the limitations set forth in 11 U.S.C. § 505(a)(2)(A)  
24 and may not be contested within the context of bankruptcy  
25 proceedings."

26 Having come to that conclusion, the District Court observed  
27 that reference to the Bankruptcy Court had been withdrawn for the  
28 limited purpose of making a determination of the legality of the  
lease-stripping tax shelter. The District Court then concluded  
that the tax issue in question had become non-reviewable by

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<sup>1</sup>Memorandum Decision of United States District Court in  
Central Valley Ag Enterprises, Inc. v. United States of America,  
CV F 03-6366 (I don't have a date.)

1 operation of the provisions of TEFRA. Thus, the court was  
2 without jurisdiction to adjudicate that issue.

3 "In short, there is nothing left for this court [the  
4 District Court] to decide that pertains to the limited issue  
5 for which withdrawal of the reference was granted. The  
6 withdrawal of the reference will therefore be vacated."

7 The Debtor had filed a motion for summary judgment on  
8 February 22, 2005, in the District Court, raising for the first  
9 time the issue of whether Claims 53 and 54 were time barred. The  
10 District Court concluded that the motion should have been brought  
11 in the Bankruptcy Court and dismissed it without prejudice.

12 Following the District Court vacating the withdrawal of the  
13 reference, the Debtor filed in this court its limited objection  
14 to Claim 53 on the grounds it was time barred and its objection  
15 to Claim 54 (never previously brought) on the grounds that claim  
16 was time barred as well. The parties have agreed that the court  
17 should confine its ruling to the objection to Claim 53. Claim 54  
18 adds somewhat over \$1,000,000 in penalties. The parties have  
19 agreed that there are insufficient assets in the estate to pay  
20 even Claim 53. Therefore, the objection to Claim 54 is moot.

21 The first time the Debtor raised the lack of timeliness was  
22 its motion for summary judgment in February 2005 in District  
23 Court. But, from the time the original objection to Claim 53 was  
24 filed, the parties have extensively litigated the substantive  
25 arguments raised in the objection to Claim 53, both in the  
26 Bankruptcy Court and in the District Court.

27 The United States has conducted extensive discovery on the  
28 merits of the issues. It has served formal and informal document  
production requests on the Debtor and numerous subpoenas and

1 informal letter requests upon the Debtor's former employees,  
2 Comdisco, Inc., the promoter of the lease-strip tax shelter in  
3 question, the accounting firm, the banks, and the four law firms  
4 and their former employees who provided services either to  
5 Comdisco or to the Debtor in connection with the tax shelter.  
6 The United States generated an electronic data base of over  
7 70,000 pages of documents, and those documents have been reviewed  
8 and, where necessary, analyzed by the United States' trial team  
9 and expert witnesses.

10 As of June 2005, the parties had taken 34 fact depositions,  
11 most of which were videotaped, in Illinois, Massachusetts,  
12 Arizona, California, Tennessee, and Georgia. The United States  
13 took nine depositions about the penalties in Arizona, Georgia,  
14 Illinois, California, and Massachusetts.

15 The parties have retained nine expert witnesses, five by the  
16 debtor and four by the United States. Opening and rebuttal  
17 expert witness reports have been exchanged. As of June 2005, the  
18 United States had incurred over \$1,114,000 in fees and expenses  
19 for expert witnesses. As of August 22, 2005, debtor's special  
20 tax counsel had requested allowance of \$1,335,316.25 in  
21 attorney's fees and over \$100,000 in expenses. The Debtor had  
22 also incurred fees for expert witnesses, in an amount of over  
23 \$290,000.

24 Prior to the withdrawal of the reference, the United States  
25 sought a stay of discovery pending resolution of its summary  
26 judgment motion in this court. The debtor opposed the request,  
27 and the court denied the motion. Seven months later, the  
28 District Court granted the United States' motion for summary

1 judgment, resolving the Debtor's substantive objection in favor  
2 of the claimant.

3 The chapter 11 case was filed in December 2001. This has at  
4 all times been a liquidating chapter 11. When Claim 53 was  
5 filed, the Debtor had objected to numerous claims, and those  
6 objections were pending. The Debtor was (and still is) engaged  
7 in selling its real property to provide funds for its liquidating  
8 chapter 11 plan. However, that plan was withdrawn, pending  
9 resolution of the IRS claims. Thus, the entire chapter 11 case  
10 has been on hold while the Debtor's objection to Claim 53 has  
11 been litigated. But not until February 2005, in the District  
12 Court, did the Debtor ever object to Claims 53 or 54 on the  
13 grounds of lateness.

14 Applicable Law

15 The Bankruptcy Code and Rules

16 Bankruptcy Code § 502(a) says that a claim, proof of which  
17 is filed under § 501, is deemed allowed unless a party in  
18 interest objects. Section 501(a) says that a creditor may file a  
19 proof of claim. The bar dates for filing proofs of claim are, in  
20 the first instance, set forth in the Federal Rules of Bankruptcy  
21 Procedure. Rule 3003(c)(3) states that in a chapter 11 case, the  
22 court "shall fix and for cause shown may extend the time within  
23 which proofs of claim . . . may be filed."

24 Here, the court fixed the time within which governmental  
25 units might file proofs of claim. Claim 53 and Claim 54 were  
26 filed well after that date. The Debtor's central argument is  
27 that because Claim 53 and Claim 54 (essentially an amendment to  
28 Claim 53) were filed after the bar date, the court should

1 disallow them. The Debtor asserts that excusable neglect does  
2 not permit the late filed claims, observing that the government  
3 never asked the court for permission to file a late claim.

4 Federal Rule of Bankruptcy Procedure 9006(b)(1) provides  
5 that, with exceptions not relevant here:

6 "When an act is required or allowed to be done at or within  
7 a specified period by these rules or by a notice given  
8 thereunder or by order of court, the court for cause shown  
9 may at any time in its discretion (1) with or without motion  
10 or notice order the period enlarged if the request therefor  
11 is made before the expiration of the period originally  
prescribed or as extended by a previous order or (2) on  
motion made after the expiration of the specified period  
permit the act to be done where the failure to act was the  
result of excusable neglect."

12 The United States did not seek authority to file a late  
13 claim until the Debtor objected to the claim as late. The court  
14 continued the hearing on the motion of the United States to allow  
15 late filed claim, pending a decision on the objection to claim on  
16 the grounds of lateness.

17 The United States argues that the Debtor has waived its  
18 ability to assert that Claims 53 and 54 are time barred. The  
19 United States also asserts that the failure to file Claims 53 and  
20 54 timely resulted from excusable neglect.

21 Kontrick v. Ryan

22 The key case here is Kontrick v. Ryan, 540 U.S. 443, 124 S.  
23 Ct. 906, 157 L. Ed. 2d 867 (2004). In that case, the Supreme  
24 Court addressed whether the time prescriptions of Federal Rule of  
25 Bankruptcy Procedure 4004 could be raised at any time in the  
26 proceeding (which the parties characterized as "jurisdictional")  
27 or must be timely invoked.

28 The rule in question in Kontrick v. Ryan was Federal Rule of

1 Bankruptcy Procedure 4004. That rule provides that a complaint  
2 objecting to a chapter 7 debtor's discharge shall be filed no  
3 later than 60 days after the first date set for the meeting of  
4 creditors. Rule 4004(b) provides that this deadline may be  
5 extended for cause if the motion seeking an extension is filed  
6 before the time has expired. Rule 9006(b)(3) allows enlargement  
7 of the time under Rule 4004(a) only to the extent and under the  
8 conditions stated in that rule. Thus, if a creditor wishing to  
9 object to a debtor's discharge does not file its complaint within  
10 60 days after the date first set for the meeting of creditors, or  
11 seek an extension of that deadline within the 60 days, Rule 4004  
12 will bar the complaint.

13 In Kontrick v. Ryan, the creditor filed an initial complaint  
14 under § 727 timely. He then amended the complaint to  
15 particularize certain facts for the first time. The amended  
16 complaint was filed after the Rule 4004(a) bar date. The debtor  
17 answered the complaint but did not raise the untimeliness of the  
18 new claim. Eventually, the bankruptcy court denied Kontrick's  
19 discharge. Kontrick moved for reconsideration, asserting that  
20 the new claim (the one on which the court had granted summary  
21 judgment) was untimely under Rule 4004. The bankruptcy court  
22 denied that motion, and the district court affirmed, as did the  
23 Seventh Circuit Court of Appeals. Both courts relied on  
24 decisions of other circuits, holding that the timeliness  
25 provisions in Rule 4004 were not "jurisdictional." The Supreme  
26 Court in its turn affirmed. The court observed that the  
27 Bankruptcy Rules do not create or withdraw federal jurisdiction.  
28 Id. at 452. The Rules merely prescribe the method by which the



1 jurisdiction granted the courts by Congress is to be exercised.  
2 Id. at 454.

3 The debtor in Kontrick argued that Rules 4004 and  
4 9006(b)(3), although not properly labeled "jurisdictional" in the  
5 sense of describing a court's subject matter jurisdiction,  
6 nonetheless had the same import as provisions governing subject  
7 matter jurisdiction. That is, according to the debtor in  
8 Kontrick, just as a challenge to subject matter jurisdiction may  
9 be raised at any stage of the proceedings, so also, an objection  
10 to timeliness should be allowed to be raised at any time in the  
11 proceedings. The Supreme Court disagreed. It stated:

12 "The equation Kontrick advances overlooks a critical  
13 difference between a rule governing subject-matter  
14 jurisdiction and an inflexible claim-processing rule.  
15 Characteristically, a court's subject-matter jurisdiction  
16 cannot be expanded to account for the parties' litigation  
conduct; a claim-processing rule, on the other hand, even if  
unalterable on a party's application, can nonetheless be  
forfeited if the party asserting the rule waits to long to  
raise the point."

17 Id. at 456.

18 According to the Supreme Court, Federal Rules of Bankruptcy  
19 Procedure 4004(a) and (b) and 9006 (b)(3) serve three primary  
20 purposes.

21 "First, they inform the pleader, i.e. the objecting  
22 creditor, of the time he has to file a complaint. Second,  
23 they instruct the court on the limits of its discretion to  
24 grant motions for complaint-filing-time enlargements.  
Third, they afford the debtor an affirmative defense to a  
complaint filed outside the Rules 4004(a) and (b) limits."

25 Id. at 456.

26 Like Rules 4004 and 9006, Rule 3003(c)(3) is a claim-  
27 processing rule. Just as no statute prescribed a time limit in  
28 Kontrick for the filing of a complaint to deny discharge, so no

1 statute prescribes a time limit to file a proof of claim. In  
2 Kontrick, the Court phrased the "sole question" as whether the  
3 creditor forfeited his right to assert the untimeliness of the  
4 amended complaint by failing to raise the issue until after the  
5 complaint was adjudicated on its merits. Here, the sole question  
6 is whether the Debtor forfeited its right to assert the  
7 untimeliness of the filing of Claims 53 and 54 by failing to  
8 raise the issue until after the objections had been adjudicated  
9 on their merits. The objections have been adjudicated on their  
10 merits because the District Court granted the motion of the  
11 United States to dismiss for lack of subject matter  
12 jurisdiction.<sup>2</sup>

13 In Kontrick v. Ryan, the Supreme Court observed that  
14 ordinarily under the Bankruptcy Rules as under the Civil Rules,  
15 an affirmative defense is lost if not included in the answer or  
16 the amended answer. Even if a defense could be equated to a  
17 failure to state a claim upon which relief could be granted, the  
18 issue could be raised at the latest at the trial on the merits.  
19 Only lack of subject-matter jurisdiction is preserved post trial.  
20 Id. at 459.

21 A decision from the Bankruptcy Court for the Eastern  
22 District of California states that Kontrick v. Ryan "teaches that  
23 one forfeits the right to rely on a deadline prescribed by an  
24 apparently inflexible bankruptcy 'claims processing rule' if one  
25 does not timely invoke the rule." In re Montanaro, 307 B.R. 194,  
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28 <sup>2</sup>The Debtor has appealed that dismissal to the Ninth Circuit  
Court of Appeals.

1 197 (Bankr. E.D. Cal. 2004).

2 A time bar is an affirmative defense which generally must be  
3 raised in an answer or responsive pleading. See, Federal Rule of  
4 Civil Procedure 8(c), made applicable to adversary proceedings in  
5 Bankruptcy Courts by Federal Rule of Bankruptcy Procedure  
6 7008(a).

7 Here, an interesting procedural question arises. This  
8 objection to claim was filed as a contested matter, and thus Rule  
9 9014 is applicable. Rule 9014(c) of the Federal Rules of  
10 Bankruptcy Procedure describes which of the Part VII Rules apply.  
11 Rule 7008, which incorporates Federal Rule of Civil Procedure 8,  
12 is not made applicable to contested matters by Rule 9014. When  
13 the original objection to Claim 53 was filed, the parties and the  
14 court agreed to treat the matter as an adversary proceeding, and  
15 it was, in fact, docketed as such. Upon the withdrawal of the  
16 reference by the District Court, the District Court treated the  
17 matter as civil action. In the context of that civil action, the  
18 Debtor filed a motion for summary judgment in February 2005,  
19 asserting the lack of timeliness of the proofs of claim for the  
20 first time. Therefore, to assert now that Rule 8 is not  
21 applicable would be of no avail. Similarly, Federal Rule of  
22 Bankruptcy Procedure 7012 makes Federal Rule of Civil Procedure  
23 12 applicable in adversary proceedings (although Rule 9014 does  
24 not make it applicable to contested matters). However, even if  
25 neither Rule 8 nor Rule 12 applies on its terms to this contested  
26 matter, the teaching of Kontrick v. Ryan about the application of  
27 the doctrine of waiver is still pertinent.

1 The Doctrine of Waiver

2 The court must, then, decide whether the Debtor has waived  
3 the objection that the claim was not timely filed by failing to  
4 raise that objection in a timely manner. The purpose of the  
5 equitable doctrine of waiver is to provide an incentive for  
6 parties to raise obvious defenses early in the proceeding, before  
7 a great amount of time and effort has been expended, so as to  
8 minimize any resulting prejudice. In re Santos, 112 B.R. 1001  
9 (9<sup>th</sup> Cir. BAP 1990).

10 In that case, the Bankruptcy Appellate Panel considered  
11 whether and under what circumstances waiver could be applied to  
12 preclude assertion of the untimeliness of a complaint under  
13 Federal Rules of Bankruptcy Procedure 4007(c) and 4004. The BAP  
14 held, initially, that the deadlines set forth in Rules 4007(c)  
15 and 4004(a) were not jurisdictional time limits. The BAP thus  
16 was prescient as Kontrick decided that issue conclusively some 14  
17 years later.

18 The BAP considered a number of factors in determining  
19 whether a failure to timely raise a limitations defense should  
20 constitute a waiver. These factors include the following.

21 "1) The obviousness of the defense's availability, 2) the  
22 stage of the proceeding at which the defense is raised, 3)  
23 the time which has elapsed between the filing of the answer  
24 and the raising of the defense, 4) the amount of time and  
25 effort expended by the plaintiff in the case at the time the  
26 defense was raised, and 5) the prejudice resulting to the  
27 plaintiff which would result from allowing the defense to be  
28 asserted."

Id. at 1008.

27 The first factor is the obviousness of the defense's  
28 availability. If the defense is obvious, it is more difficult to

1 explain why it was not timely raised. In this case, the Debtor's  
2 attorney, Hilton Ryder, acknowledged in a declaration that he was  
3 aware at the time the initial objection was filed that Claim 53  
4 was filed late. However, he mistakenly concluded that a tardily  
5 filed claim in chapter 11 would not be disallowed. Thus, the  
6 Debtor, through its counsel, was aware of the defense at the time  
7 the original objection to claim was filed, yet chose not to raise  
8 it.

9 The Debtor asserts that the obviousness of the defense  
10 should act in its favor because the defense was so obvious that  
11 the United States knew about the defense when the claim was late  
12 filed. This argument lacks merit. Under Kontrick v. Ryan, the  
13 lateness of the proof of claim is an affirmative defense, which  
14 the Debtor is responsible to raise.

15 The second factor is the stage of the proceedings at which  
16 the defense is raised. Here, as set forth earlier, the defense  
17 was not raised until the objection to claim had been pending for  
18 some time and not until the parties had spent over two million  
19 dollars in pretrial work and discovery.

20 The Debtor asserts that Local Rule of Bankruptcy Procedure  
21 3007-1(b) and Federal Rule of Bankruptcy Procedure 3007 do not  
22 require an itemization of every fact or defense that the debtor  
23 might have an objection. Nonetheless, to have an obvious  
24 objection to a proof of claim, an obvious defense to the claim of  
25 the IRS and not to raise it until after years of litigation had  
26 passed, is certainly not contemplated by either Rule 3007 or the  
27 applicable Local Rule.

28 According to the Debtor, it is not required to spell out

1 every theory of objection. Southland Corp v. Kilgore & Kilgore  
2 (In re Southland Corp.), 19 F.3d 1084, 1087 (5<sup>th</sup> Cir. 1994).

3 That case is distinguishable because under its facts, the debtor  
4 provided actual notice to the creditor on several separate  
5 occasions about the disputed issue. Here, there is no evidence  
6 to suggest that the Debtor ever provided actual notice to the  
7 United States that it intended to object to Claim 53 on the  
8 grounds that it had been late filed. As the United States has  
9 observed, the purpose of the doctrine of waiver is to preclude  
10 defenses that otherwise have no time limit.

11 The third factor is the time that has elapsed between the  
12 filing of the answer and the raising of the defense. The United  
13 States filed its proof of claim on October 9, 2002. The Debtor's  
14 original objection was filed in April 2003. The objection to  
15 timeliness was not raised until brought in District Court in  
16 February 2005. Thus, the Debtor waited almost two years to raise  
17 this issue. During that time, the parties expended vast sums of  
18 money and time in litigating the substantive issue. Further, the  
19 court, both the Bankruptcy Court and the District Court have  
20 expended resources on the substantive issue.

21 The fourth factor is the amount of time and effort expended  
22 by the plaintiff (here the IRS) at the time the defense was  
23 raised. Here, the government had spent over \$1,000,000 in expert  
24 witness fees and expenses, and conducted extensive discovery.

25 The fifth factor is the prejudice resulting to the plaintiff  
26 which would result from allowing the defense to be asserted.  
27 According to the United States, it would be severely prejudiced  
28 because of the time and expense it has incurred. The court

1 agrees. The United States has spent over \$1,000,000 in outside  
2 expert fees. Resources of time and personnel have been spent by  
3 counsel for the United States. Both the District Court and the  
4 Bankruptcy Court have spent a great deal of time on issues raised  
5 by the substantive objection, and the Debtor itself has incurred  
6 large attorney and expert fees. If this case does not  
7 demonstrate the sort of prejudice that should result in waiver,  
8 the court is hard pressed to know what would.

9 The Debtor asserts that the United States is at fault  
10 because it did not file a motion under Federal Rule of Bankruptcy  
11 Procedure 9006(b) to excuse the late filing. The Debtor says  
12 that if the United States had filed such a motion, the lateness  
13 of the claim would have been put before the court for decision  
14 immediately. In support of this argument, the Debtor cites a  
15 Seventh Circuit case. In re K-Mart Corp., 381 F.3d 709 (7<sup>th</sup> Cir.  
16 2004).

17 In the K-Mart case, claimant Simmons filed a proof of claim  
18 one day after the bar date. On September 23, 2002, Simmons'  
19 attorney received a notice from K-Mart telling her that her claim  
20 was time barred. Simmons' attorney then waited until October 21,  
21 2002, to move under Rule 9006(b)(1) of the Federal Rules of  
22 Bankruptcy Procedure for the proof of claim to be deemed timely  
23 filed. All told, 81 days elapsed between the time of the claims  
24 bar date and the time she filed the Rule 9006(b) motion. In  
25 addition to considering other factors, the Seventh Circuit Court  
26 of Appeals held that the 81 day period was simply too long. Id.  
27 at 714.

28 But the facts in the K-Mart case were very different from

1 the facts here. The Court of Appeals reviewed the decision of  
2 the Bankruptcy Court by the following standard:

3 "The Bankruptcy Court's refusal to deem Simmons' claim  
4 timely filed will be overturned only in extreme cases, when  
the Bankruptcy Court has abused its discretion."

5 Id. at 712. Under the circumstances of the case, including the  
6 many creditors similarly situated to Simmons, the Court of  
7 Appeals concluded that the Bankruptcy Court had not abused its  
8 discretion. That is far from expressing a general rule that an  
9 81 day period between a bar date for filing a proof of claim and  
10 filing a motion under Rule 9006(b) is too long. Further, the  
11 language of Bankruptcy Code § 502(a) does not support the  
12 Debtor's argument that the United States was required to file a  
13 motion under Rule 9006(b) to excuse the late filing. Section  
14 502(a) states that a claim, proof of which is filed under § 501,  
15 is deemed allowed unless a party in interest objects. The burden  
16 was on the Debtor to come forward with an objection to the proof  
17 of claim. By waiting so long to raise the issue of timeliness,  
18 the Debtor has waived that argument.

19 Late Filing Excusable

20 Although the motion to excuse late filing filed by the  
21 United States is a separate matter (a countermotion) and has been  
22 continued to a new calendar date and thus is not under submission  
23 now, nonetheless the Debtor has raised the question of whether  
24 the late filing is excusable under Federal Rule of Bankruptcy  
25 Procedure 9006 as part of its objection to the late filed claim.  
26 Thus, the court will address that issue here.

27 In Pioneer Investment Services Co. v. Brunswick Associates  
28 Ltd. Partnership, the Supreme Court described the standards for



1 excusable neglect under Federal Rule of Bankruptcy Procedure  
2 9006(b). 507 U. S. 380, 113 S. Ct. 1489, 123 L. Ed. 2d 74  
3 (1993).

4 "Because Congress has provided no other guideposts for  
5 determining what sorts of neglect will be considered  
6 'excusable,' we conclude that the determination is bottom an  
7 equitable one, taking account of all relevant circumstances  
8 surrounding the party's omission. These include, as the  
9 Court of Appeals found, the danger of prejudice to the  
debtor, the length of the delay and its potential impact on  
judicial proceedings, the reason for the delay, including  
whether it was within the reasonable control of the movant,  
and whether the movant acted in good faith."

10 Id. at 394.

11 The court agrees that there is a lack of prejudice to the  
12 Debtor. The Debtor, through its wholly owned subsidiary, Orange  
13 Coast Enterprises, Inc., controlled 98% of Astropar. The Debtor  
14 should have been aware of the impending tax debt because the  
15 Debtor's wholly owned subsidiary, Orange Coast Enterprises, Inc.,  
16 was the Tax Matters Partner of Astropar. The IRS was not  
17 auditing the Debtor; it was auditing Astropar. Under TEFRA, the  
18 audit takes place at the partnership level. Astropar had a  
19 different tax identification number from the Debtor. However,  
20 the Debtor did not list Astropar or the pending audit of that  
21 entity on its schedules. Thus, it is excusable that the IRS  
22 originally failed to identify the Debtor in time to file a timely  
23 proof of claim. The declaration of Oscar Gipe, a Revenue Officer  
24 with the IRS, is to the effect that in his regular practice of  
25 preparing proofs of claim, he does not check for TEFRA related  
26 entity audits, unless the Debtor reported the TEFRA related audit  
27 on its petition or supporting schedules. The Debtor here did not  
28 do so. When Mr. Gipe checked his records before the plan

1 confirmation hearing in October 2002, the IRS records showed that  
2 substantial assessments of additional tax had been made on July  
3 29, 2002. Mr. Gipe then immediately prepared an amended proof of  
4 claim (Claim 53), reflecting the additional assessments and  
5 caused a copy to be faxed to the Debtor's attorney. According to  
6 Mr. Gipe, Mr. Ryder was not surprised by the new assessments and  
7 indicated that his client was aware of the pending audit. See,  
8 Declaration of Oscar Gipe filed June 29, 2005, in opposition to  
9 the objection to late filed claim. Therefore, the court can  
10 conclude that the delay was reasonable. The IRS was not  
11 negligent. The IRS acted in good faith.

12 The delay has not prejudiced the Debtor. This is a  
13 liquidating chapter 11 case. Creditors are to be paid in order  
14 of priority. No reorganization is impeded by the late claim.  
15 Rather, the late claim, if allowed, simply changes the amounts to  
16 be distributed in this liquidating case. As the Debtor should  
17 have been aware of the pending tax claim from the beginning, the  
18 court cannot find prejudice to the Debtor. No plan has been  
19 confirmed in the case. Also indicative of lack of prejudice to  
20 the Debtor is the fact that the Debtor waited so long to raise  
21 the lateness defense.

22 For all those reasons, the court finds that the lateness of  
23 filing Claim 53 was excusable neglect.

24 For the foregoing reasons, the objection to Claim 53 will be  
25 overruled. The objection to Claim 54 is moot. Counsel for the

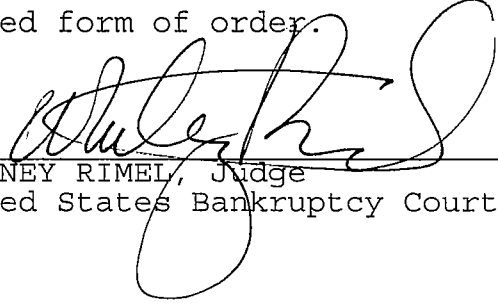
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1 United States may present a proposed form of order.

2 DATED: September 14, 2005.

3   
4 WHITNEY RIMEL, Judge  
5 United States Bankruptcy Court  
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## PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA )  
 ) ss.  
 COUNTY OF FRESNO )

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within above-entitled action; my business address is 2656 U.S. Courthouse, 1130 O Street, Fresno, California, 93721. On September 14, 2005, I served the within document on the interested parties in said action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Fresno, California, addressed as follows:

Hilton A. Ryder, Esq.  
 McCormick, Barstow, Sheppard,  
 Wayte & Carruth  
 P. O. Box 28912  
 Fresno, California 93729-8912

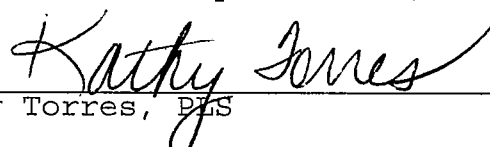
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 1110 U. S. Courthouse  
 1130 O Street  
 Fresno, California 93721

I certify (or declare), under penalty of perjury, that the foregoing is true and correct. Executed on September 14, 2005, at Fresno, California.

  
 Kathy Torres, DJS